IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 69 of 1985

For Approval and Signature:

HON'BLE MR.JUSTICE N.G.NANDI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

LAKHABHAI JASUBHAI SINCE DEC. THRO LEGAL HEIRS & REP.

Versus

RAMESHCHANDRA RAMJIBHAI VIRADIA

Appearance:

1. Second Appeal No. 69 of 1985

MR PM THAKKAR for Petitioner No. 1-2

MR DC SEJPAL for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE N.G.NANDI

Date of decision: 16/02/2004

CAV JUDGEMENT

1. This appeal under section 100 of the Code of

Civil Procedure is directed against the judgment & decree passed in Regular Civil Suit No. 491 of 1980 by the Learned Civil Judge (J.D.) at Bhavnagar, confirmed in Regular Civil Appeal No. 99 of 1983 by the District Court, Bhavnagar.

2. It is suggested that the present respondent (ori. plaintiff) filed suit against the defendants (present appellants) for recovery of the possession of the suit premises on the averment that, the defendant no.2 was working as the maid-servant at the house of the father of the plaintiff and for the sake of convenience and getting better services a residential accommodation of a small kachha room was given to defendant no.2 till she worked as the maid-servant at the house of the plaintiff's father. Thus according to the plaintiff, defendant no.2 was given residential accommodation for the sake of convenience and getting better services as she did not have any residence, so long as she worked as the maid-servant. That, defendant no.1 is the husband of defendant no.2; that defendant no.2 left the job of maid-servant at the house of the plaintiff and therefore defendant no.2 rendered herself liable to handover the vacant possession of the suit premises, and therefore the suit.

3. The defendant resisted the claim of plaintiff by filing written statement, inter alia contending that, she is a monthly tenant in the suit premises at a rent of Rs.25-00 per month; that the premises were rented from the father of the plaintiff; that defendant no.2 used to work in the house of the plaintiff since many years, that father of the plaintiff used to deduct rent from the salary/wages which was payable to defendant no.2 and the remaining amount of salary/wages was paid to defendant no.2.

4. Learned trial judge, appreciating the oral as well as documentary evidence holding that defendant No.2 was in permissive possession of the suit premises, decreed the suit, requiring the defendants to hand over vacant and peaceful possession of the suit premises to the plaintiff on or before 14-5-1983. The decree further directs inquiry to be held under Order 20 Rule-12 of Civil Procedure Code for determining the mesne profit.

5. It is submitted by Mr. Dagli, for M/s. Thakkar Associates, learned advocate for the appellants (ori. defendants) that defendant No.2 was inducted in the suit premises as a service tenant and that the defendant being tenant in the suit premises, the remedy for the plaintiff

is to resort to the provisions contained in the Bombay Rent Act for evicting defendant No.2 from the suit premises. It is further contended that the plaintiff became the owner of the suit premises pursuant to the registered partition deed; that the said partition deed if produced on record would have shown the nature of possession / occupation of defendant No.2 in the suit premise and, as the plaintiff has suppressed the material evidence in the form of partition deed, adverse inference should be drawn against the plaintiff by accepting the defendant's version of service tenancy.

6. It is submitted by Mr. D.C. Sejpal, learned advocate for the respondent (ori. plaintiff) that on the partition, property including suit premises fell to the share of the plaintiff; that partition deed is not relevant for deciding the status of defendant No.2 in the suit premises, and the plaintiff's ownership over the suit premises is not disputed; that the defendant was inducted in the suit premises without creating any interest in favour of defendant No.2 simply because she was working in the house of the father of the plaintiff for doing household work and the premises were given to defendant No.2 only for the sake of convenience and getting better services of defendant No.2 and the possession of the defendant in the suit premises was merely a permissive possession.

7. R & P of the case have been requisitioned from the trial court and I have gone through the same.

It is not in dispute that defendant no.2 was working as a maid-servant in the house of the plaintiff's father situated in Plot No: 1533/A. It is suggested from exhibit-26, i.e. the certificate issued by Bhavnagar Municipality that the Plot No. 1533/A is mutated in the name of the plaintiff. The plaintiff in his evidence exhibit-22 has also deposed to the effect that the immovable property, inclusive of the suit premises on partition has fallen to the share of the plaintiff.

One of the contentions raised on behalf of the appellants is that the appellant no.2 is a service tenant in the suit premises. It has been the say of the defendants that, defendant No.2 is a tenant at a monthly rent of Rs.25/- in the suit premises. Defendant No.2 in her evidence exhibit-36 particularly in cross-examination has deposed that, initially she was paid Rs.12/- per month by way of salary/wages for doing household work. There is no evidence to suggest that when the monthly

wage/salary was Rs.12/-, then, how the remaining amount of rent was paid by the defendant to the plaintiff's father.

8. According to the defendant, the rent was adjusted in the salary/wages which was payable to the defendant and after deducting rent remaining amount of salary/ wages was paid to the defendant. Except the bare word of defendant there is absolutely no evidence to substantiate this contention of the defendant. There is nothing to show what was the monthly amount of salary / wages. If the rent of Rs.25/- per month was deducted from the salary, there would be some amount remaining payable to the defendant suggesting the payment of rent by her, by way of adjustment as deposed.

9. It is pertinent to note that before filing the suit defendant No.2 was served with notice exhibit-27 requiring her to vacate the premises. Strangely enough defendant No.2 admittedly did not give reply to the notice requiring her to vacate the suit premises. If the defendant was a tenant in the premises, then, she would have certainly refuted plaintiff's say in the notice as regards her permissive possession in the suit premises and asserted her tenancy right in the suit premises. For the reasons best known to her, defendant No.2 did not choose to give reply to notice exhibit-27 and refute the plaintiff's say. This conduct of the defendant would go to suggest that in fact defendant No.2 had no defence to the claim of the plaintiff calling upon her to vacate the suit premises. It may also be seen that, there is nothing to suggest that even during the pendency of suit defendant No.2 deposited any amount by way of rent. All what she says is that she had deposited amount in the court but there is no evidence to the effect that any amount by way of rent / mesne profits deposited in the Court pending the suit. It need hardly be said that in the suit wherein defendant has been stated to be a licensee / in permissive possession of the suit premises and when the defendant is claiming to be the tenant in the suit premises, then, after initial burden is discharged by the plaintiff, it is for the defendant to discharge her burden by showing nature of her possession or status in the premises. In the instant case there is absolutely no evidence even to remotely suggest that defendant No.2 was inducted as a tenant or subsequently treated/accepted as a tenant, and not giving reply to the notice exhibit-27 belies the say of defendant No.2 as far as the nature of her possession in the suit premises is concerned.

10. In the case of B.M. Lall (dead) by his legal representative Vs. M/s. Dunlop Rubber Co. (India) Ltd and another, reported in AIR 1968, S.C. 175, it has been observed in para (4) ".... The transaction is a lease if it grants an interest in the land; it is a license if it gives a personal privilege with no interest in the land. The question is not of words but of substance and the label which the parties choose to put upon the transaction, though relevant is not decisive. The test of exclusive possession is not conclusive, though it is a very important indication in favour of tenancy. A servant in occupation of premises belonging to his master may be a tenant or a licensee. A service occupation is a particular kind of license whereby a servant is required to live in the premises for the better performance of his duties and it is treated as part & parcel of his remuneration, the he is a licensee, eventhough the value of the house is quantified in money; but if he is given an interest in the land, separate and distinct from his contract of service, at a sum properly to be regarded as a rent, then he is a tenant and nonetheless a tenant because he is also a servant. "

In para-5 it is held that ".. the agreement on its true construction read in the light of the surrounding circumstances operated as a license and not as a tenancy. It created no interest in the land. It gave only a personal privilege or license to the servant to occupy the premises for the greater convenience of his work. He being a licensee his occupation would be for its own occupation. "

11. Coming to the other contention raised by Mr. Dagli as regards the suppression of material evidence in the form of partition deed and drawing adverse inference against plaintiff by accepting the defendant's version of service tenancy, it may be seen that it is not the say of the defendant in her evidence exhibti-36 that after she ceased to be in the employment of the plaintiff's father she sent rent by money orders. The evidence does not suggest any attempt having been made by the defendant to send the rent after she ceased to be in the employment of the plaintiff's father. It may be appreciated that, there will be no question of deducting rent from the wages/salary after defendant ceased to be in the employment of the plaintiff's father. More over no evidence has been adduced to show that in the municipal record the defendant was shown to be a tenant in the suit premises at a particular rent. It is true that the entry in the municipal record would be for fiscal purpose only in as much as it would not suggest the nature of

occupation of a person in the premises. Apart from that non production of partition deed by the plaintiff would not improve the defendant's position for the simple reason that partition deed was for division of the properties amongst the parties to the partition deed, and the plaintiff's ownership over the suit property is not in dispute. It would be nothing but presumption on the part of the defendant to say that the partition deed would contain the status of the defendant in the suit premises. It may be seen that, in the cross examination of the plaintiff it is not suggested that the partition deed refers to the presence of the defendant in the suit premises, much less as the tenant therein. I do not find any merit in this contention of the defendant, though the principle that a party in possession of best evidence which would throw light on the issue in controversy withholding it, Court ought to draw an adverse inference against him notwithstanding that onus of proof does not lie on him and the party cannot rely on abstract doctrine of onus of proof or on the fact that he was not called upon to produce it, as laid down in case of Gopal Krishnaji Ketkar Vs. Mohmad Haji Latif and others, AIR 1968 S.C. page 1413 cannot be disputed even for a moment.

12. In the above view of the matter, it can not be said that both the Courts below have committed any error in law in concurrently finding the defendant No.2 was in permissive possession of the suit premises for convenience and getting better services inducted in the suit premises by plaintiff's father, and would be liable to be evicted from the suit premises on her cessation from the service. The concurrent finding of fact arrived at by both the courts below does not call for any interference and the appeal being devoid of substance, is liable to be dismissed.

13. In the result, appeal fails.

Dt:16-2-2004 (N.G. Nandi, J)

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